Supreme Court, U.S.
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No. 01-160

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CLERK

IN THE

Supreme Court of the United States

TA OPERATING CORPORATION,
d/b/a TravelCenters of America,
Petitioner,

v.

FLORIDA DEPARTMENT OF REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida First District

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REPLY TO BRIEF IN OPPOSITION

SUSAN L. KELSEY*
MARK E. HOLCOMB
HOLLAND & KNIGHT LLP
315 South Calhoun Street
Tallahassee, FL 32301
(850) 224-7000

Counsel for Petitioner

*Counsel of Record

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Does the Commerce Clause of the United States Constitution require that a state taxing the full and unapportioned value of transactions in interstate commerce provide taxpayers a credit for taxes paid on the same goods in other jurisdictions?

2. Does the Commerce Clause of the United States Constitution require a state to have nexus with the taxpayer, in addition to nexus with the transaction, in order to tax a transaction in interstate commerce?

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REPLY TO BRIEF IN OPPOSITION

The brief in opposition filed by Respondent, the Florida Department of Revenue (the "Department"), fails to identify any perceived misstatements of fact in the Petition. SUP. CT. R. 15.2.

The Department claims that TA Operating "ignores" the existence of a Florida statute making a $5 special fuel dealer's license a prerequisite to exemption from the tax. Br. Opp. 1. To the contrary, TA Operating expressly noted in its Petition that the trial judge's ruling made licensure a prerequisite to Commerce Clause protections. Pet. 4 & App. 18a. TA Operating went on to note that the appellate court expressly rejected the trial court's reasoning (which the Department had advanced on appeal):

> We *reject* DOR's reading of the licensure statute as purporting to make such licensure a precondition to rights the Commerce Clause confers.

App. 3a (emphasis supplied).

The Florida appellate court rejected the Department's licensure arguments on state law principles of statutory construction, instead interpreting the statute as evidencing appropriate deference to federal constitutional protections. App. 3a-4a ("Properly construed, the statute does not purport to make licensure a prerequisite for invoking rights under the Commerce Clause or any other constitutional provision."). The Department offers no reason to reverse the appellate court's decision on this point and revert to the trial court's analysis. Instead, the Department describes its licensure argument as its "unifying theme," Br. Opp. 9, a demonstrably unsound foundation for opposition to TA Operating's petition.

Under the Supremacy Clause, article VI, clause 2 of the United States Constitution, Florida's fuel tax license requirements may not infringe upon Commerce Clause protections afforded to TA Operating. A state law that stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" conflicts with federal constitutional law and is invalid. *Witco Corp. v. Beekhuis*, 38 F.3d 682, 687 (3d Cir. 1994) (quoting from *California Federal S&L Ass'n v. Guerra*, 479 U.S. 272, 280-81 (1987)). Any state's right to configure its own tax system is restricted by federal constitutional limitations on that right. Florida may not design or apply its tax system, including its licensure requirements, in a way that violates federal law.

Federal constitutional protections apply with special force in revenue-raising tax cases such as this, as contrasted with regulations in the exercise of a state's police power. *Freeman v. Hewitt*, 329 U.S. 249, 253 (1946) ("[b]ecause the greater or more threatening burden of a direct tax on commerce is

coupled with the lesser need to a State of a particular source of revenue, attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of aspects of such commerce."), *abrogated on other grounds in Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 285 (1977). The special fuels tax at issue is a dedicated excise tax, created for the exclusive purpose of raising revenue for road maintenance, repair, construction, and related expenses. Fla. Stat. Ann. § 206.85 (West 1993). Accordingly, it is subject to more strict review, which it cannot withstand. This tax violates the Commerce Clause, and thus also the Supremacy Clause.

The Florida appellate court properly rejected the Department's argument that the state's licensure requirement could stand as a complete obstacle to TA Operating's federal constitutional protections. This invalid argument having been the sum and substance of the Department's brief in opposition and self-described as the Department's "unifying theme," the Court should reject it and summarily reverse the decision of the Florida First District Court of Appeal, remanding with instructions to enter judgment in favor of TA Operating.

I. THE DECISION BELOW SQUARELY CONFLICTS WITH THIS COURT'S DECISIONS REQUIRING A CREDIT MECHANISM TO ENSURE FAIR APPORTIONMENT OF TAXES IMPOSED ON INTERSTATE COMMERCE, AND SHOULD BE REVERSED.

The Department's brief in opposition asserts that the transactions at issue were not in interstate commerce and therefore were not protected by the Commerce Clause. Br. Opp. 3-4. The undisputed facts, however, establish that title to the fuel passed to TA Operating simultaneously with the pumping of the fuel directly from the overhead loading rack into a common carrier's trucks for immediate shipment out of

Florida. Under this Court's precedents, each such sale and shipment was a single interstate transaction protected by the Commerce Clause.

Where a sale and immediate shipment of goods are part of a single event taking the goods across state boundaries, a state tax on the sale is subject to the four-part test of *Complete Auto Transit*, 430 U.S. at 279. This Court has explained the breadth of interstate commerce under similar circumstances:

> The incidence of the tax here at issue . . . is Appellants' "taking" of gas from [the] Plant . . . after the gas has been produced, gathered, and processed by others than Appellants. *The "taking" into Appellants' pipelines is solely for interstate transmission and the gas at that time is not only actually committed to but is moving in interstate commerce.* . . . This economic process is inherently unsusceptible of division into a distinct local activity capable of forming the basis for the tax here imposed, on the one hand, and a separate movement in commerce, on the other.

Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 166-68 (1954) (emphasis supplied). The *Michigan-Wisconsin Pipe Line* Court relied on *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946) (invalidating under Import-Export Clause a sales tax on oil sold from storage and loaded directly onto a foreign-bound ship). After determining that what constitutes an "export" is intertwined with what constitutes "interstate commerce," *id.* at 76, the *Richfield Oil* Court explained that a single event *both* passed title *and* commenced exportation:

> The very act that passed the title and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods.

Id. at 81 (quoting *A.G. Spalding and Brothers v. Edwards*, 262 U.S. 66, 69-70 (1923)). Like the taxes nullified in *Michigan-Wisconsin Pipe Line* and *Richfield Oil*, the Florida fuel tax at issue here was imposed when the fuel entered the stream of commerce. Fla. Stat. Ann. § 206.87(1)(a) (West 1993) (tax imposed on the first sale or transfer of title in Florida). App. 21a. The sale of the fuel to TA Operating as it passed into the common carrier's trucks also marked the beginning of interstate commerce and was not a distinct "local event." Thus, Commerce Clause protections are implicated.

The Department's brief in opposition next asserts that "[b]ecause the entire sale took place in Florida, there was nothing to apportion." Br. Opp. 5. That contention misses the mark. TA Operating has never contended that the Florida tax must be apportioned; rather, TA Operating contends that the tax violates the internal consistency test of *Complete Auto Transit*, which requires a hypothetical replication of Florida's tax scheme in every other state, because it was imposed on the "first sale or transfer of title within this state" without a corresponding credit for excise taxes previously paid to other states on the same fuel. Pet. 11-14; App 21a. The sales tax cases cited by the Department, *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995), and *State Tax Commission of Utah v. Pacific States Cast Iron Pipe Co.*, 372 U.S. 605 (1963), are equally unavailing. The tax systems at issue in both of those cases afforded a credit for taxes paid on the same goods in another state. *See* Pet. 14. Florida's fuel tax system did not.

Finally, the Department makes no attempt to defend the Florida appellate court's use of a "*but see*" signal to dismiss this Court's controlling decision in *Michigan-Wisconsin Pipe Line*. App. 11a. The Florida appellate court's citation of *Michigan-Wisconsin Pipe Line* with a "*but see*" signal evidences that court's own recognition that the cases are not

materially distinguishable. The Department's weak attempt to distinguish the case, again on the grounds of the licensure issue, is unavailing. Br. Opp. 5-6. The Court should summarily reverse the decision under review upon the authority of *Michigan-Wisconsin Pipe Line*, and remand with instructions for entry of judgment in favor of TA Operating.

II. THE DECISION BELOW SQUARELY CONFLICTS WITH THIS COURT'S DECISIONS REQUIRING TAXPAYER NEXUS IN ADDITION TO TRANSACTION NEXUS FOR TAXES IMPOSED ON INTERSTATE COMMERCE, AND SHOULD BE REVERSED.

The Department's brief in opposition offers no disagreement with TA Operating's argument that the law requires taxpayer nexus in addition to transaction nexus before a State may tax a transaction in interstate commerce. There remains, therefore, no dispute between the parties as to the error in the Florida appellate court's bald assertion that "No additional taxpayer nexus requirement exists." App. 8a. This Court should not allow this patent and undisputed error of law to stand uncorrected, but rather should summarily reverse the erroneous decision of the Florida appellate court.

The Department likewise does not dispute the facts that TA Operating itself never entered Florida, had no locations or business operations in Florida, no personnel in Florida, and no sales in Florida. The Department does not dispute that TA Operating's only contact with Florida was through the common carrier that collected the fuel at the point of sale and immediately transported it out of Florida to TA Operating's Brunswick, Georgia truckstop. The Department does not dispute that Florida law makes the common carrier itself liable for Florida fuel tax on an apportioned basis under Chapter 207, Florida Statutes (West 1993).

The Department's sole defense on this issue (before lapsing again into the licensure argument) is that TA Operating's use of a common carrier equated, for constitutional purposes, with TA Operating's own physical presence in Florida. Br. Opp. 7. This position is plainly at odds with this Court's decisions in *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992), and *National Bellas Hess, Inc. v. Illinois Department of Revenue*, 386 U.S. 753 (1967), *overruled on other grounds in Quill*, 504 U.S. at 307. These cases require that a taxpayer have a "substantial" physical presence in the taxing state, and establish a "safe harbor" rule that the use of a common carrier does *not* create the requisite presence. *Quill*, 504 U.S. at 315 n.8, 311-12; *Bellas Hess*, 386 U.S. at 758. The Department offers no meaningful distinctions between this case and *Quill* or *Bellas Hess*, concluding simply that without an exporter's license, TA Operating could be treated as the ultimate retail consumer in Florida for tax purposes. Br. Opp. 8. As already discussed, Florida's nominal licensure requirement cannot validly stand as an obstacle to TA Operating's Commerce Clause rights, and thus the Court should reject the Department's position and adhere to the safe harbor rulings of the Court's own precedents, summarily reversing the Florida decision to the contrary.

CONCLUSION

The Court should grant the petition for a writ of certiorari and summarily reverse the judgment of the Florida court, remanding with instructions that judgment be entered in favor of TA Operating.

Respectfully submitted,

SUSAN L. KELSEY*
MARK E. HOLCOMB
HOLLAND & KNIGHT LLP
315 South Calhoun Street
Tallahassee, FL 32301
(850) 224-7000

*Counsel of Record

Counsel for Petitioner

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